



MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen
Chair

Kenita V. Barrow
Vice Chair

November 19, 2018

Advisory Opinion 18-10-014

You have sought the answer to several questions regarding the attendance of members of the Board of Investment Trustees (“the Board”) at meetings hosted by third parties and the acceptance of meals, beverages, and other expenses in connection with the meetings.

Issue I: Accepting Gifts from Restricted Sources Concerning Activities on Behalf of Parties other than the Board

1. Do the County’s prohibitions concerning gifts apply when a Board member attends a meeting or event as a representative of his/her outside employer or affiliate rather than as a representative of the Board, and receives meals, beverages and other expenses from the host of the event where the host also does business with the Board?

The Public Ethics Law at 19A-16(c) prohibits public employees from “knowingly accept[ing] a direct or indirect gift from a restricted donor.”

A restricted donor is, pursuant to 19A-4(o), a person or business that does business with the County agency with which the public employee is affiliated or has a financial interest that may be substantially and materially affected in a manner distinguishable from the public generally by the performance or nonperformance of the public employee’s duties.

The scenario presumes the host does business with the Board and is a restricted donor for purposes of the gift restriction. Whether 19A-16(c) applies here is a function of whether a public employee is the recipient of and “accepts” the gift. If the gift is accepted by the public employee, the 19A-16(c) prohibition applies, and the gift may not be accepted unless an exception applies under 19A-16(d). (So, for example, meals and beverages consumed in the presence of the restricted donor can be accepted by a

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public employee where (a) the meals and beverages do not exceed \$50 in value (from the same source during a one-year period) or (b) there is a function attended by at least 20 persons. If the “annual client meeting” referenced in the scenario involves fewer than 20 persons, the \$50 cap per year cap would apply.) On the other hand, if the gift of meals, beverages, and other expenses is not accepted by the public employee, but instead is accepted by the public employee’s outside employer, then, in theory, 19A-16(c) would not apply.

The Ethics Commission believes a gift is accepted by the outside employer and the prohibition of 19A-16(c) not implicated where reasonable expenses for food, travel, lodging, and scheduled entertainment have not been offered or enhanced because of the employee’s County position and either (a) the invitation is made to the outside employer and the employee is formally designated (by a writing in advance) to attend the event for the outside employer or (b) there is otherwise a formalized review process in advance of the event where the outside employer makes the determination to “accept” the gift.

2. The Executive Director of the Montgomery County Employee Retirement Plans (MCERP) is a trustee on the State of Maryland’s Pension Board, and as such may attend meetings or conferences hosted by a restricted donor as a trustee of the State Pension Board and not as the MCERP Executive Director. Can the Executive Director accept a gift of a meal and beverages from a restricted donor of the County MCERP when attending on behalf of the State Pension Board?

The scenario presumes that the gift is acceptable under the State Ethics Law because if the State’s Public Ethics Law prohibits the gift, the question is moot; the gift could not be legally accepted. There is little variance between the State’s ethics law and the County’s. Fundamentally, if a gift is acceptable pursuant to the State’s ethics law, it is likely to be acceptable under the County’s law. One relevant difference concerns meals and beverages. With respect to functions involving fewer than 20 persons, the County imposes \$50 cap per year per restricted source while the State has no dollar cap on meals and beverages consumed in the presence of the donor.

The Commission considers this situation to be fundamentally equivalent to the first scenario. A gift will be deemed accepted by the State Pension Board if the gift is for reasonable expenses for food, travel, lodging, and scheduled entertainment where it is clear that such benefits have not been offered or enhanced because of the employee’s County position and either (a) the invitation is made to the State Board and the employee is formally designated (by a writing) to attend the event for the State Board

or (b) there is a formalized review process in advance of the event where the State Board makes the determination to “accept” the gift.

Consequences for Financial Disclosure Purposes of Acceptance of Benefits Pursuant to Scenarios 1 & 2

County employees who are public financial disclosure filers under the County’s Public Ethics Law are required to list each gift valued at more than \$20 or any series of gifts totaling \$100 or more received during the reporting period from or on behalf of, directly or indirectly, a restricted donor. Where the outside employer or State Pension Board accepts a gift in a manner consistent with the advice rendered here, there is no gift to the employee and no financial disclosure is required. On the other hand, if a gift is accepted using the meals and beverages exception to the gift prohibition, but nonetheless meets the thresholds for gift reporting in the financial disclosure section of the law, then the gifts will be required to be disclosed in accordance with the financial disclosure section of the ethics law – regardless of whether the affected public employee is acting in the service of the outside employer or the State Board when receiving the gift from the restricted source.

Issue II: Accepting Gifts from Investment Limited Partnerships the Montgomery County Employees’ Retirement System (ERS) and Montgomery County Consolidated Retiree Health Benefits Trust (CRHBT) are Invested In.

The ERS and CRHBT invest as limited partners (LPs) in private limited partnerships, with each being run by a Private Fund. Generally, the Limited Partnership Agreement (LPA) between the Private Fund and its LPs requires that partnership expenses be paid for by the Private Fund, and that LPs such as the ERS and CRHBT contribute their share of partnership expenses to the Private Fund.

The partnership expenses outlined in a standard LPA typically include expenses of annual LP meetings of the Private Fund which all LPs may attend. As LP representatives of the ERS and CRHBT, Board members and Staff may receive meals and beverages from the Private Fund or its manager while attending an annual LP meeting.

1. Assuming the LPA requires that expenses of annual LP meetings to be treated as partnership expenses and that the Private Fund is to host the annual LP meeting, would meals and beverages received by a Board member or Staff at such an annual LP meeting pursuant to the LPA be considered a gift?

No. Something that has been paid for by the County is not a “gift.” Pursuant to the definitions in the Public Ethics Law, “gift” is defined as “the transfer of anything of economic value . . . without an exchange of consideration of at least equal value.” 19A-4(h). If meals and beverages are obtained by government contract, inclusive of a partnership agreement, then there has been consideration for what is transferred in an amount that is intended to be equal value. Of course, if benefits are conferred upon public employees that are not provided for by the LPA – then these benefits would likely be considered gifts.

This is not to say that County employees are free to, in their official capacities, enter contracts that are designed to confer benefits on the County employees themselves. To do so would risk offending prohibitions on use of public office for private gain incorporated into the ethics law. For example, section 19A-14(a) prohibits an employee from misusing the prestige of office for private gain. In addition, were a benefit to an employee arranged with a private entity that exceeds what would constitute a necessary expense for the County, such might be inconsistent with State and County law limiting the spending of County funds for necessary expenses. In an extreme case, such expenses could be considered waste, fraud or abuse, or even constitute a kickback under 11A-51 of the County Code.

2. Assuming the LPA does not require the Private Fund to host an annual LP meeting, could meals and beverages received by a Board member or Staff at an annual LP meeting be regarded as part of the service the Board contracted for under the LPA, rather than as a gift, assuming any cost is treated as a partnership expense paid for by the Private Fund?

The scenario, in effect, suggests the possibility that if a gift is charged by the entity running the LP as an LP expense and the County is a limited partner, that the County is the source of the benefit in the same fashion as where expenses of events are expressly provided for in an LPA.

There are several factors that result in the answer to this being no; that this would be a gift from the Private Fund rather than something conferred by the County on its representatives.

When the County enters into an LP, the County vets the LPA for legal compliance with a myriad of County requirements, including the appropriate disposition of County funds, or in this case, the County’s share of its funds that it invests in the LP. Where a contract does not expressly provide for the expenditure of funds that would allow the conferring of a benefit on a public employee, then this check on the legality of the arrangement would be absent. Were the answer to be different, any County contractor – LP or otherwise – could present gifts to County employees and, as long

as the expense was charged back to the contract, claim that the expense was being born by the County and that there was no gift.

And, when the County is not the entity that is making the decision to confer a benefit (which is what happens when the contract does not expressly provide for the benefit to be conferred), it is the Private Fund manager that makes that decision, and the manager is really the one who is incentivized to influence public employee to the manager's advantage, such as to encourage the County to maintain investment in the LP; increase investment in the LP or to invest in other LPs managed by the Private Fund.

As the scenario posed concerns meals and beverages, there is a substantial likelihood the gifts would qualify for the meals and beverages exception in the gift law if more than 20 persons will be present and will consume the meals and beverages in the presence of the restricted donor. Again, if a gift is accepted using the meals and beverages exception to the gift prohibition, but nonetheless meets the thresholds for gift reporting in the financial disclosure section of the law, then the gifts will be required to be disclosed in accordance with the financial disclosure section of the ethics law.

For the Commission:



Steven Rosen, Chair